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No. 04-108

In the

Supreme Court of the United States

SUSETTE KELO, et al.,

Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, et al.,

Respondents.

On Writ of Certiorari to
The Supreme Court of the State of Connecticut

BRIEF AMICI CURIAE OF MARY BUGRYN DUDKO, FRANK BUGRYN, JR., MICHAEL J. DUDKO, HARRY PAPPAS, CURTIS BLANC, PACIFIC LEGAL FOUNDATION, AND CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Fifth Amendment, as incorporated to the states, limits the power of eminent domain to "public use[s]." The State of Connecticut condemned private property to transfer to private developers who use it for their own profit. Do the economic results of this transfer constitute a "public use"?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici are two public interest legal foundations, as well as a group of individual citizens who have had their property taken via eminent domain, or have been threatened by condemnation, to benefit private parties. Mary Bugryn Dudko, Frank Bugryn, Jr., and Michael Dudko are members of the Bugryn family, whose homestead was taken by the City of Bristol, Connecticut, to benefit a steel company. Harry Pappas is the son of John and Carol Pappas, whose land was condemned by Las Vegas, Nevada, to build a parking lot for a casino consortium. Curtis Blanc owns a warehouse in Liberty, Missouri, which he leases to a group of charitable organizations, and which is being threatened with condemnation to build an industrial park.

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and has represented the views of thousands of supporters nationwide who believe in limited government and private property rights, in such cases as *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as amicus curiae in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). PLF also participated as amicus in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), urging the Michigan Supreme Court to overrule the notorious eminent domain case

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

of *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981). PLF participated as amicus in support of the petition for certiorari in this case.

The Center for Individual Freedom (CFIF) is a nonprofit, nonpartisan foundation dedicated to defending the individual rights protected by the United States Constitution, including the right to own property. Since its founding in 1998, CFIF has appeared before this Court as amicus curiae in several cases involving the Fifth Amendment's protections of life, liberty, and property.

INTRODUCTION AND SUMMARY OF ARGUMENT

Good fences make good neighbors, and one of the strongest legal "fences" in the Constitution is the public use clause. It prohibits citizens from using the power of eminent domain to take their neighbors' land for their own private benefit.

Yet this Court's decisions have come to equate "public use" with "any benefit to the public." *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. at 241. Since *anything* the legislature decides to do can be plausibly described as a benefit to the public, the consequence has been an epidemic of private condemnations, with states and local governments routinely taking property for redistribution to private interests, particularly businesses which use the property for their own profit.

Economists call this phenomenon "rent seeking": private parties try to gain control of the eminent domain power and use it for their own advantage. Rent-seeking behavior is economically wasteful, damages the rule of law, and seriously undermines private property rights. Between 1998 to 2003 alone, there were approximately 10,000 reported cases of condemnation or threatened condemnation for the benefit of

private parties. *See generally* Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (2003). Those who suffer the most from such rent-seeking are the parties who have the least political influence, which usually means racial minorities and the poor. Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 56 (1998).

Amici will illustrate the rent-seeking phenomenon, and the deleterious social effects resulting from the broad interpretation of "public use," by reference to specific examples. As this brief demonstrates, condemnation is an extreme example of government coercion. Its effects on property owners are severe, not only in the form of economic deprivation, but in emotional, psychological, and social terms as well. Condemnations that take the land of innocent citizens, and transfer it to private developers for their own profit, are fundamentally unfair. They threaten not only the legal standards established by the Constitution, but also the more abstract social values of citizenship and domestic tranquility.

Only this Court can restore the Public Use Clause as an effective constitutional limit on the abuse of government power. The Court has repeatedly declared that such private takings are unconstitutional. *See, e.g., Midkiff*, 467 U.S. at 240. This Court should restore the Constitution's protections for private property not only to ensure that the law is followed as written, but also to ensure that citizens can trust in the security of their property, and in fair and equal treatment by the governments under which they live.

ARGUMENT

I

THE EVISCERATION OF THE "PUBLIC USE" CLAUSE HAS CAUSED A PROLIFERATION OF RENT-SEEKING CONDEMNATIONS

A. Eminent Domain Abuse Is a Threat to the Homes and Businesses of All Americans

The practical effect of the erosion of the "Public Use" Clause has been a rash of condemnations benefitting private parties. One recent study found over 10,000 instances of government using or threatening to use eminent domain to benefit private parties, just in the past five years. *See* Berliner, *supra*. Nationwide, over 3,700 properties have been condemned for the benefit of private parties since 1998, and over 6,000 have been threatened with condemnation. *Id.* at 2. In fact, this estimate may be far too conservative, since many condemnations are not challenged by landowners, who lack the resources to oppose a condemnation.

Most eminent domain abuse occurs at the local level. For example, the City of Merriam, Kansas, condemned a Toyota dealership in order to sell the land to the BMW dealership next door. Linda Cruse, *Merriam Sells Condemned Property to Baron BMW*, Kansas City Star, Jan. 27, 1999, at 4 (1999 WL 2402262). The City of Bremerton, Washington, condemned 22 homes, including the home of an elderly widow named Lovie Nichols, in part to resell the land to private developers. Mrs. Nichols challenged the condemnation, but the court upheld the taking. *City of Bremerton v. Estate of Anderson*, 1999 WL 1116811 (Wash. App. Div. 2 Dec. 3, 1999), *rev. denied*, 10 P.3d 407 (Wash. 2000). The City of Corte Madera, California, condemned a private owner's land to give to a developer to build a grocery store. This, too, was permitted. *Town of Corte Madera v. Yasin*, No. A092777, 2002 WL

1723997 (Cal. App. 1st Dist. July 25, 2002). In one especially notorious case, billionaire Donald Trump nearly convinced the government of Atlantic City, New Jersey, to condemn the home of an elderly widow so that he could build a limousine parking lot. *See Casino Reinvestment Redevelopment Auth. v. Banin*, 727 A.2d 102 (N.J. 1998); Stephen J. Jones, Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 288 (2000).

The primary victims of such condemnations are poor minorities, and the primary beneficiaries are wealthy, politically powerful groups, who are more able to persuade authorities to condemn property for their benefit. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 598-99 (2003); Kochan, *supra*, at 56.

B. Rent Seeking Is the Inevitable Consequence of the Erosion of the Public Use Requirement

Whenever government has power to redistribute benefits and burdens between constituents, those interest groups will compete for control of that power, to secure benefits for themselves or to impose burdens on their competitors. Modern scholars refer to this as the problem of "rent seeking." *See generally* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 287 (Ann Arbor Paperbacks, 1965) (1962) ("[T]he profitability of investment in [political organization] is a direct function of the size of the total public sector and an inverse function of the 'generality' of the government budget . . . . The organized pressure group thus arises because differential advantages are expected to be secured through the political process . . . ."). Rent seeking leads to at least four major social problems.

First, it is unjust for citizens to have their property taken from them and given to others based not on merit or on any other valid public reason, but simply because they are less

successful at political activism. As Professor Sunstein has put it, the Constitution's authors believed it was unjust for "government power [to] be usurped solely to distribute wealth or opportunities to one group or person at the expense of another." Instead, they believed that "government action [should] result[ ] from a legitimate effort to promote the public good rather than from a factional takeover." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690-91 (1984).

Second, rent seeking is economically inefficient, because it encourages groups to invest their resources and energy into nonproductive activity such as lobbying rather than into wealth-creating activity or innovation. *See* Buchanan & Tullock, *supra*, at 111 ("bargaining opportunities afforded in the political process *cause the individual to invest more resources in decision-making*, and, in this way, cause the attainment of 'solution' to be much more costly"). This harms the public because it distracts producers from meeting consumer needs.

Third, rent seeking has a ratchet effect. Since the benefits conferred by government will be localized and concentrated, while the costs are broadly dispersed, the incentives will be skewed toward increased lobbying and ever-increasing amounts of wealth distribution. *See id.* at 287-88 (noting "spiral effect" of ever-greater lobbying efforts). Suppose government takes $1 from each of 100 people, and gives it all to person X. It is in X's interest to spend $99 to convince the government to do this again; but it is only in the interest of each other person to spend $1 to convince it not to. Rent-seeking behavior therefore tends to "restrict[ ] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938); *see also* Kochan, *supra*, at 81 ("It is not cost-efficient . . . for a taxpayer to fight a particular piece of special-interest legislation.").

The fourth problem is that rent-seeking behavior rewards those who are already most wealthy and powerful. A group's wealth can greatly affect its ability to influence legislation. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 115-16 (2003). Small grassroots organizations, or individuals, are less able to rally support behind a cause. And in the eminent domain context, winners are so enriched that they are increasingly likely to win the next time around. This problem is acute in eminent domain abuse.

> Even though a particular condemnation may concentrate the cost of the taking on the affected landowner . . . that owner is not likely to invest enough to successfully oppose the condemnation. First, the existence of compensation, even when not truly substituting for market or subjective value, decreases the cost to the affected owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation. Furthermore, the special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process . . . . Additionally, the interest group is unlikely to seek rents through condemnation and transfer if it does not believe that it has a reasonable likelihood of success.

Kochan, *supra*, at 82. Experience bears out these predictions. Wealthy neighborhoods are rarely condemned for "economic development." Instead, poor or middle class neighborhoods are condemned to make way for those in higher income brackets. For example, in one recent case, the City of Canton, Mississippi, tried to condemn 23 acres of minority-owned land to give to the Nissan Corporation to build an auto plant. Sandefur, *supra*, at 598. Although authorities dropped their case before the State Supreme Court ruled, the case is typical of economic development condemnations: landowners who are less

politically adept are at the mercy of those who exercise raw political power.

II

EMINENT DOMAIN ABUSE WREAKS HAVOC ON FAMILY AND SOCIETY

A. Unchecked Use of Eminent Domain Damages Civility

Robert Frost famously said that "good fences make good neighbors." Robert Frost, *Mending Wall* (1949), *reprinted in Robert Frost: Collected Poems, Prose, and Plays* 39 (R. Poirier & M. Richardson eds. 1995). The phrase means that respect for each other's privacy and individuality reinforces the sense of goodwill that makes for a healthy community. As Nobel laureate Friedrich Hayek put it,

> The understanding that "good fences make good neighbours," that is, that men can use their own knowledge in the pursuit of their own ends without colliding with each other only if clear boundaries can be drawn between their respective domains of free action, is the basis on which all known civilization has grown. Property . . . is the only solution men have yet discovered to the problem of reconciling individual freedom with an absence of conflict . . . . There can be no law in the sense of universal rules of conduct which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act.

1 F.A. Hayek, *Law, Legislation, and Liberty: Rules and Order* 107 (1973). *See also* Richard Pipes, *Property and Freedom* 119 (1999) ("It is the sense of economic independence and that of personal worth which it generates that give rise to the idea of freedom."). Indeed, societies that lack strong, enforceable property rights tend to suffer from profound social ills, including

economic stagnation, and worse. *See id.* at 224 ("The curtailment to the point of abolition of personal rights and freedoms in totalitarian states thus went hand in hand with the curtailment, to the point of abolition, of private property.").

American culture has long cherished the spirit of neighborliness and mutual respect that reach their highest expression on election day. Then, citizens with the most profound political differences settle their disputes peacefully, by ballot, and return safely to their homes, unafraid of reprisals, if their favored candidate should lose. The next day, these citizens, who shortly before were chanting opposing slogans and even making "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), can come together again as peaceful fellow citizens. This sense of domestic tranquility depends entirely on "good fences": that is, on mutual respect for property rights and, thereby, the individual liberties of one's fellow citizens. Thomas Jefferson noted that in America,

> [e]very one, by his property, or by his satisfactory situation, is interested in the support of law and order. And such men may safely and advantageously reserve to themselves a wholesome controul over their public affairs, and a degree of freedom, which in the hands of the [mob-rule] of the cities of Europe, would be instantly perverted to the demolition and destruction of everything public and private.

Letter to John Adams (Oct. 28, 1813), *in The Adams-Jefferson Letters* 391 (L. Cappon ed. 1959).

Eminent domain abuse threatens this sense of domestic tranquility by putting the private property rights of some citizens at the mercy of others. Unlike simple political differences on policy outcomes or particular candidates, eminent domain proceedings result in depriving the losing person and his family

of their homes or businesses, destroying the social bonds that make for healthy neighborhoods. A stark example of this arose in 1981, when Detroit condemned the Poletown neighborhood for the benefit of the General Motors Corporation, promising that a new auto factory would create jobs and alleviate a crushing economic recession. *See generally* Jeanie Wylie, *Poletown: Community Betrayed* (1989). The public debate over the project turned what had been a peaceful, integrated community, into a heated clash between neighbors and officials. As Wylie describes,

> people whose lives were composed of their union loyalty, their tenure in the auto plants, their patriotism, and their willingness to fight in U.S. wars were rejected, ignored, and robbed by the very institutions through which they claimed their identities . . . . [T]hese same people broke free of the illusion of civility that these institutions carry as trappings . . . . [H]istorically law-abiding Poletown residents felt free to cry out and to disrupt [a General Motors stockholders] meeting. In exactly the same spirit, Poletown resisters learned to interrupt reporters' interviews, to raise placards at the mayors' inaugural dinner, and, ultimately to go to jail when the city's police force moved on the [town's] church.

Id. at 219-20. After heated protests and a hurried decision by the State Supreme Court, the condemnation proceeded, and the Poletown neighborhood was razed to make way for an auto plant that never created the 6,000 jobs that were promised. *Id.* at 230. The residents of Poletown came to see democracy not as a system of mutual respect and participation toward a common good, but as a machine, destroying their homes, their family heritage, and their community.

Alexis de Tocqueville argued that American democracy rested on democratic *mores*, and in particular on the spirit of restraint by which "no one in the United States has dared to profess the maxim that everything is allowed in the interests of society, an impious maxim apparently invented in an age of freedom in order to legitimize every future tyrant." Alexis de Tocqueville, *Democracy in America* 292 (G. Lawrence trans., J. P. Mayer ed. 1969). Tocqueville believed that this spirit of restraint—that is, of mutual respect for each other's rights—was responsible for the fact that "while the law allows the American people to do everything," there are things which their *mores* "forbid[ ] them to dare." *Id.* But eminent domain abuse upends these *mores*, and puts the livelihood and the safety of a citizen's home at the mercy of the political process. Indeed, the eradication of the "public use" clause has established the principle that "everything is allowed in the interests of society," and turned the ballot box into a weapon. As a result, citizens learn to disrupt public proceedings, interrupt interviews, and otherwise break with the principles of civility on which good citizenship rests. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("fundamental values of 'habits and manners of civility' [are] essential to a democratic society").

This harms not only the relationship of citizens to their government, but of citizens to each other, as well. In his dissent in the *Poletown* case, Justice Ryan noted that it was "easy to underestimate the overwhelming psychological pressure which was brought to bear upon [the] property owners" who challenged the condemnation of their homes, "especially the generally elderly, mostly retired and largely Polish-American residents." 304 N.W.2d at 470 (Ryan, J., dissenting). The plans for the Poletown project were met with "a crescendo of supportive applause" from "[l]abor leaders, bankers, and businessmen . . . [and] radio, television, newspaper and political opinion-makers," who sought "new tax revenues, retention of a mighty GM manufacturing facility . . . new opportunities for

satellite businesses, retention of 6,000 or more jobs, and concomitant reduction of unemployment." *Id.* at 470-71. These landowners were forced to stand up for their property in the face of crushing political pressure, something which landowners are often unable or unwilling to do. "In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

B. Eminent Domain Abuse Sets Neighbor Against Neighbor and Disrupts Family Life

Eminent domain cases frequently leave property owners as solitary defenders of their property, with little moral or financial support from the community.

> [T]he dispossessed are disadvantaged by the one-shot nature of their involvement. Thus, relative to other concentrated groups (such as the construction firms that may support government construction), they may have less clout . . . . [T]heir political power relative to the groups favoring government projects . . . may determine whether landowners will block the project.

Daniel Farber, *Public Choice and Just Compensation*, 9 Const. Commentary 279, 290 (1992). Thus property owners who do not want to sell their land generally experience a sense of isolation, which is aggravated in private takings cases by the business community's enthusiasm for the condemnation.

The Bugryn family—four siblings in their 70s and 80s—owned two homes and a Christmas tree farm in Bristol, Connecticut, totaling 32 acres. This land had been in the family

for more than 60 years when, in the mid-1990s, city officials decided to increase tax revenue and employment by putting their land to more industrial use. At first, the city government sought to condemn the land to transfer it to the nearby Yarde Metals Corporation, which wanted the state highway frontage area where the two Bugryn homes were located, so that it could showcase the business with a large sign and entrance way. *See* Don Stacom, *Bulldozers Level Family's Homes, Crews Clear Way for Business Park*, Hartford Courant, Oct. 29, 2004, at B3 (2004 WL 97569879). The city repeatedly asked the Bugryns to sell their land, but the family declined the offers, which were less than half the real value of the land. In May, 1998, homeowner Frank Bugryn, filed for an injunction in state court to bar the condemnation. *Bugryn v. City of Bristol*, 774 A.2d 1042, 1045 (Conn. 2001), *cert. denied*, 534 U.S. 1019 (2001). "I don't want to go anywhere," he told the court. "My parents built the family house in 1939, and I built my own house on the property 42 years ago. I'm almost 78. Where am I going to go now?" MaryEllen Fillo, *Bugryns Take Case to Court, Fight City's Plan to Seize Property*, Hartford Courant, Oct. 7, 1999, at B1 (1999 WL 19959746). Mayor Frank N. Nicastro, however, told the court that the industrial park was "in the best interest of the future growth of the city," because it would "build up the tax base." *Id.*

The trial court denied the injunction, holding that the condemnation of the Bugryns' homes "[did] not . . . constitute serious or material injuries," *Bugryn v. City of Bristol*, 2000 WL 192887, at *3 (Conn. Super. Jan. 31, 2000), and that "the disruption to the homeowners that the taking of their property would cause them [does not] evince[ ] an irreparable injury." *Id.* at *8. The Bugryns appealed, in the face of constant pressure from the city government and community leaders; indeed, the *Hartford Courant* repeatedly editorialized against them. *See, e.g., Time to Make the Land Deal*, Hartford Courant, Feb. 8, 2000, at A8 (2000 WL 4226790); *Keep Plant*

In the Area, Hartford Courant, Sept. 14, 2000, at A12 (2000 WL 23020391); *Another Loss for the Bugryns*, Hartford Courant, Aug. 5, 2003, at A10 (2003 WL 59295286). The Connecticut Court of Appeals, however, affirmed the denial of the injunction. *Bugryn*, 774 A.2d at 1050 ("neither this court nor the trial court can second-guess the decision of the agency or the municipality that adopted the plan"). When the litigation delayed the city's plans, Yarde Metals left the area. Nevertheless, the city proceeded, deciding instead to take the Bugryns' land for the Southeast Bristol Business Park.

Shortly after he lost his legal challenge, Frank Bugryn was offered $110,000 for his home, too little to find a comparable home to move into. Jackie Majerus, *Housing Market Pricy for Bugryns*, Bristol Press, Oct. 5, 2002.[2] As an elderly man, Bugryn needed a home with few stairs, and hoped to avoid moving into an apartment. "I'd rather have a ranch like I have," he told a reporter. "That's why I built my own, to live here until I die. But it didn't work out that way." *Id.* In 2002, the family finally agreed to a compensation amount in mediation, on the condition that the elderly generation live out their lives at their homes. But the city rejected this in a closed session. While the city initiated eviction proceedings, 76 year old Michael Dudko, husband of one of the Bugryn sisters, had relapse of cancer. The city, however, proceeded with eviction threats. Mr. Dudko died in September, 2003.

Unable to find a suitable new home, the Bugryns delayed until May, 2004, when the City ordered them to vacate the property immediately. In November, 2003, a new mayor had been elected on a platform promising not to take the Bugryns' property, but in the spring, the mayor changed his mind, and threatened to use marshals to evict the Bugryns. Once again, the newspaper editorialized against them, referring to their legal

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[2] http://www.zwire.com/site/news.cfm?newsid=5605624&BRD=1643&PAG=461&dept_id=10486&rfi=6 (visited Nov. 8, 2004).

challenge to the condemnation as a "public farce," and a "melodrama," and denouncing the family for "stall[ing] and draw[ing] upon the public's sympathy." *It's Time Bugryns Moved Out*, Hartford Courant, Apr. 9, 2004, at A10 (2004 WL 76026254). Meanwhile, after a nearby radio station ran a story about the Bugryns' plight, an anonymous, irate telephone call to city hall forced the police to post a guard in the mayor's office. Ken Byron, *Mayor's Office Under Guard After Irate Telephone Call*, Hartford Courant, Apr. 2, 2004, at B3 (2004 WL 72901667). Relations between the Bugryn family itself became strained; when one sister failed to leave the house in time, her nephew took the city's side, telling reporters "[p]eople are pointing the finger at the mayor and the council and city officials, but all they're really doing in taking the property is using an eminent domain system that was given to them by the legislature." Ken Byron, *Bugryn Deadline Is Tonight: City Lawyer Says Two Women in Home Have Taken No Action Toward Moving*, Hartford Courant, Apr. 1, 2004, at B6 (2004 WL 72901474).

As the Bugryns' story so sadly illustrates, eminent domain abuse is terribly disruptive to the bonds of family and community, and breeds a sense of disillusionment toward democratic institutions best expressed by Frank Bugryn himself, who told a reporter "I'm a veteran of WWII, I fought for our freedom, democracy. But it seems 60 years later it doesn't work." WFSB Bristol, *Bristol Seeks to Evict People for Industrial Park*.[3] His brother in law, Michael Dudko, was born in Poland and was taken by the Nazis from his home when he was 15 years old, and was forced into farm labor during World War II. Here in his new country, as a naturalized U.S. citizen, Dudko watched the government throw him out of his home as

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[3] http://www.wfsb.com/Global/story.asp?S=954365 (visited Nov. 8, 2004).

he was dying. Dudko's son, Michael, an amicus in this case, expresses the shock of condemnations:

> It has become an act of stealing—citizens private property rights are totally disregarded. You're cheated on the value of what they take. There is dishonesty on the part of elected officials of why they are doing what they are doing. Those freedoms we all talk about on the Fourth of July don't mean much if our government can make a buck off its citizens by nullifying their validity . . . . Any moral values are totally ignored in the government pursuit to get what only a few decision makers want to happen. Power does corrupt.

The disillusionment caused by this sort of treatment is deeply harmful to a democratic society. As legal scholar Eric Claeys writes, the American founders saw property not only as a vital protection for individual liberty, and an essential part of a healthy economy, but also as a necessary foundation of healthy social participation. *See* Eric Claeys, *Property, Morality and Society in Founding Era Legal Treatises*, Paper presented to American Political Science Association annual meeting, Aug. 30, 2002.[4]

> [T]he Founders appreciated that self-government, the moral virtues, and social happiness cannot flourish unless . . . [t]he law and political opinion . . . teach and habituate citizens to see their fellow citizens not as rivals but as neighbors and potential friends. That spirit of concord and friendship cannot flourish without security and trust. Security and trust, however, cannot flourish unless people first feel secure that they can take care of their most basic

[4] http://apsaproceedings.cup.org/Site/papers/068/068008Claeys Eric.pdf (visited Nov. 8, 2004).

> needs of survival and, more generally, that none of their would-be friends will interfere with their own . . . . As [James] Wilson emphasizes, without the establishment of private property, "the tranquility of society would be perpetually disturbed by fierce and ungovernable competitions for the possession and enjoyment of things, insufficient to satisfy all, and by no rules of adjustment distributed to each." Trite as it may sound, good fences make good neighbors.

Id. at 32 (quoting James Wilson, *On Property, in* 2 *Works of James Wilson* 719 (R. McCloskey ed. 1967)).

Eminent domain abuse puts the private property of citizens at the mercy of each other's whim, thus perpetually disturbing the tranquility of society. Thomas Hobbes warned that in the state of nature, "there [can] be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can keep it." Thomas Hobbes, *Leviathan* 101 (M. Oakeshott ed., 1962) (1651). But the framers of the Constitution specifically rejected the Hobbesian vision. *Palazzolo v. Rhode Island*, 533 U.S. at 627 (explicitly rejecting Hobbesian view of property rights). They established a regime where property could be taken only for *public* use, but *not* in cases where the people might abuse that power to, in James Madison's words, "despoil . . . the minority of individuals." Letter to James Monroe (Oct 5, 1786), *in The Complete Madison* 45 (Saul Padover ed., 1953). Employing eminent domain to transfer property to successful political interest groups "is only reestablishing under another name and a more specious form, force as the measure of right." *Id.* The social consequence is to set neighbor against neighbor, and family member against family member, and wreak havoc on the social *mores* that underlie a healthy democratic society.

C. Redevelopment Condemnations Leave Homeowners with Little Voice in Safeguarding Their Communities

John and Carol Pappas were Greek immigrants who, in 1940, purchased 7,000 square feet of land in Las Vegas, Nevada, which contained a small retail center. They leased the property to several small retail shops. John often told his wife, "When I die, you'll have this property to support you . . . . This is going to be your retirement." Michael Squires, *Few Gains Seen from Land Fight*, Las Vegas Review-Journal, Aug. 15, 2004, at 1B (2004 WL 61428384). But in the ensuing years, the use of eminent domain for economic redevelopment became increasingly common. Hand in hand with the proliferation of such private condemnations was the abuse of the procedures by which such takings are performed.

In 1985, the city council created a redevelopment agency to redesign downtown Las Vegas. *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 17-18 (2003), *cert. denied*, 124 S. Ct. 1603 (2004). The city adopted a redevelopment plan despite the fact that there was "no indication that the property was blighted in any way." *Id.* at 17-18 (Leavitt, J., dissenting).

The following year, the city held a public hearing to address landowners' concerns that the plan might include eminent domain. The appellate court later described this hearing as highly misleading to members of the community. "City officials," the court noted, "repeatedly assured the citizenry that eminent domain would rarely be used." *City of Las Vegas Downtown Redevelopment Agency v. Carol Pappas et al.*, No. A327519 (Nev. DCA 1996), at 49a.[5] The mayor, for example,

[5] Pursuant to Rule 32(3), a request to lodge this unreported decision has been sent to the Clerk of the Court and, if granted, Amici will immediately lodge the decision.

told the audience, "It's not like we are going to wipe out all of Downtown Las Vegas including your area into a big empty lot and then start building." *Id.* at 51a. The city attorney said, "I think people may be getting upset about something that really is never going to happen," and a city councilman said, "I'd just like to make one comment about eminent domain. This Board has always had the power of eminent—and you've seen how we use it in the past. Never . . . since I've been on this Board." *Id.* at 53a.

This hearing was not a serious attempt to inform or protect property owners, but was instead a formalistic show, where citizens were shushed or simply ignored:

> [I]n the exchange between Mayor Briare and a Mrs. Clark . . . Mrs. Clark seeks to learn if any of the comments at the hearing will change anything in the text [of the redevelopment plan]. Briare informs her that the board will decide the question. Mrs. Clark persists and asks what sections in the Plan protect an individual citizen. Briare tells her that the protection is this public hearing. He cuts her off without answering her question by stating that there is "nothing in here that is designed to hurt them."

Id. at 54a.

Although Nevada law entitles property owners to legally challenge a redevelopment plan, the city "never informed [the Pappases or other area landowners] of the right to legally challenge the Plan." In fact, the city officials' constant and repeated assurances that the city would not use eminent domain led the citizens not to challenge the plan at all. *Id.* at 54a.

In 1993, a group of casinos decided to construct the Fremont Street Experience, an open-air pedestrian mall including casinos, retail outlets, and topless bars. The casinos created a corporation to handle construction. Seeking land for

a parking garage, the corporation executed an agreement with the Redevelopment Agency whereby the agency would condemn the Pappas family's land, and transfer it to the corporation.

The city's record of procedural abuse, begun at the public hearing, continued in court as well. The agency filed its condemnation action on November 19, 1993, along with a motion asking the court to allow the city to immediately occupy the land pending the entry of judgment. The city did not serve the Pappases until three weeks later. The agency also sought an order shortening time, but did not serve the Pappases. The appellate court explained:

> What the Pappas Family had owned for nearly fifty years was stripped from them in less than 50 seconds in a summary proceeding . . . at which they were not even present. During that hearing, the Agency represented to the Judge that there was no opposition to the motion for immediate occupancy despite their knowledge that Pappas . . . opposed efforts to take the property from her. The Agency failed to inform the Court of its having conducted the environmental study the previous day even though that was their stated purpose for the immediate occupancy . . . . [T]he attorney for Pappas . . . on January 4, 1994, received notice of the entry of judgment . . . [and] filed a Motion for Reconsideration . . . to no avail. On February 16, 1994, the Court denied the Motion for Reconsideration. The Pappas property was now in the hands of the agency.

Id. at 60a. The Pappases challenged the taking in litigation that lasted several years, but they were unsuccessful. *Pappas*, 76 P.3d at 12. Today, the Pappas family's land is a private parking garage for the Fremont Street Experience.

This case is all too typical. Redevelopment condemnations have led city officials to regard themselves as sculptors of

neighborhoods, whose raw materials are the homes and businesses of citizens. These officials, focusing on the promises of development, pay little regard to property rights. As the Nevada Court of Appeal put it, the redevelopment agency

> set itself up as an entity answerable only unto itself. The Agency truly believes that compliance with the statutes is a matter of lip service and not of customer service. The Agency has convinced itself that it can operate in its own world making deals without answering to the courts, the legislature, or the public.

City of Las Vegas Redevelopment Agency, *supra*, at 107a.

"This Court has emphasized the importance in a democratic society of preserving local control of local matters." *City of Rome v. United States*, 446 U.S. 156, 202 (1980). But condemnations that are driven by powerful private developers leave the people of a community with little chance to influence the direction of their communities. They simply cannot compete with powerful business interests working in concert with government to deprive them of their property.

Victims of condemnation thus feel like outsiders, "without a voice in decisions which may profoundly affect [them] and [their] famil[ies]." *Rosario v. Rockefeller*, 410 U.S. 752, 764 (1973) (Powell, Douglas, Brennan, Marshall, JJ., dissenting). And the results are often perverse. In fact, the *Pappas* case is a prime example of what happens when courts are overly deferential to legislative determinations of "public use." In many communities, bighted neighborhoods are often characterized by an excess of "adult" entertainment establishments. Here, ordinary business establishments on land owned by the Pappas family was condemned to make way for a parking lot owned by a consortium of casinos which includes such attractions as the Topless Girls of Glitter Gulch, *see* Richard Abowitz, *Gulch Doesn't Glitter and It's Not Gold*, Las

Vegas Weekly,[6] and which advertises itself euphemistically as the place "where grown ups come to play."[7] Meanwhile, despite the massive expenditures of the Fremont Street Experience, business in the area has continued to fall. In 2002, they fell 8%. Rod Smith, *Aging Properties, California Challenge Hurt Off-Strip Gaming Node*, Las Vegas Review-Journal, Dec. 15, 2002 (2002 WL 6884281). In 2003, they fell another 6%. Steven Mihailovich, *Decision Maker: Joseph Schillaci, New Chief Hopes to Light up Downtown Attraction*, Las Vegas Business Press, Dec. 15, 2003 (2003 WL 11197028).

D. Eminent Domain Abuse Lures Public Officials from Their Duty To Protect the Public Interest

"[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961). Unfortunately, the power of condemnation for the benefit of private interest groups—justified by reference to attenuated public benefits like job creation—weakens that faith severely. Public officials using eminent domain for redevelopment too often become tools of private interests, and even those who act in good faith have little guidance from this Court as to what constitutes a public or a private use.

Flush with the financial prospects of redevelopment through condemnation, officials in cities throughout the nation no longer see their role as protectors of their community.

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[6] http://www.lasvegasweekly.com/2002/05_16/nightlife_skin.html (last visited Nov. 8, 2004).

[7] Fremont Street Experience, *Downtown Las Vegas Visitor Profile Accentuates Adult Environment*, (http://www.a2zlasvegas.com/fse/fse06.html) (last visited Nov. 8, 2004).

Instead, they have come to see themselves as *sculptors* of the community. In Boynton Beach, Florida, city officials considering whether to condemn some neighborhoods for the benefit of private developers took time to hold a hearing entitled "Why We Are Doing This," to address citizens' questions about the taking of their homes and businesses. The Director of the city's redevelopment agency explained:

> Boynton Beach has a population of 62,847 compared to 61,627 in Delray Beach. These two cities are almost identical in population. However, when comparing median household incomes, Boynton Beach ranks lower at $39,845 than Delray at $43,371. Boynton Beach ranks higher in median household income than West Palm Beach at $36,774 . . . . The purpose of this redevelopment, is to compensate for the loss of one of the City's major taxpayers. Our property tax values are meager compared to other cities and this redevelopment is our attempt to enhance property values within this City. Our choices are to expand our tax base, raise property taxes or reduce services to our citizens . . . . In Boynton Beach, there is a significant amount of property that pays little or no taxes. Given that reality, we must do other things to compensate for that loss of tax dollars.[8]

To put it in simpler language, if the city condemns the property of poor people, and gives that property to richer people, the result will be an increase in the city's median income.

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[8] Minutes of Boynton Beach City Council Meeting, Apr. 29, 2003 at 1-2. (http://weblink.ci.boynton-beach.fl.us/Index.asp?DocumentID=19751&FolderID=14493&SearchHandle=12868&DocViewType=ShowImage&LeftPaneType=Hidden&dbid=0&page=1) (last visited Nov. 9, 2004).

In case after case, the use of eminent domain to serve private interests has turned public officials into mere instruments of private business interests, diverting their attention from the public's interest in secure property rights. In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), the City of Lancaster, California, condemned a 99 Cents Store to transfer the property to a nearby Costco. As the District Court found,

> Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. Indeed, Lancaster itself admits that the *only* reason it enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco . . . . [B]y Lancaster's own admissions, it is was willing to go to any lengths—even so far as condemning commercially viable, unblighted real property—simply to keep Costco within the city's boundaries. In short, the *very reason* that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco . . . . Yet, Lancaster nevertheless insists that the need to keep Costco satisfied is, by itself, sufficient for purposes of the Public Use Clause.

Id. at 1129.

Similarly, in *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the court found that city officials had essentially become agents of private developers: the city's "planning efforts here appear to consist of finding a potential landowner for property that they did not own, and then designing a development plan around that new user." *Id.* at 1230. There, the city sought to take land belonging to a church to transfer to a Costco store.

The court concluded that officials had made their condemnation decisions "in order to 'appease Costco.'" *Id.*

Yet, under the influence of their power to redistribute land, city officials are increasingly incapable of distinguishing between their public duties on one hand, and serving powerful private interest groups which seek to use government's coercive powers for their own private gain, on the other. Since this Court has often reiterated the rule that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void," *Midkiff*, 467 U.S. at 245, lower courts would normally "look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext." *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d at 1229. Unfortunately, the rational basis test used to judge condemnations makes this inquiry nearly impossible, and thus provides little guidance for city officials. Simply put, *Berman* and *Midkiff* held that "public use" and "public benefit" are synonymous—and yet "public benefit" is a notoriously unclear concept, particularly when it is assessed under the rational basis test. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) (legislative declaration that a project is a public benefit is "well-nigh conclusive"). Practically any private development can be plausibly described as a benefit to the public, however. Public officials therefore have no way of judging whether "keep[ing] Costco satisfied is, by itself, sufficient for purposes of the Public Use Clause." *99 Cents*, 237 F. Supp. 2d at 1129.

In *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), the court noted that public officials must not "us[e] the cloak of their official positions to effect their private ends" through eminent domain, but that applying "the usual extreme deference that courts owe to legislative determinations of public use," it could not prevent such private takings:

> If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use', and if those officials could later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings.

Id. But that is precisely what has happened in the public use context. Only this Court can prevent the continued private harms and decline of public institutions which result from equating "public use" with "any public benefit."

E. Private Takings Undermine the Conditions of Healthy Citizenship

Curtis Blanc, through his company, Mid-America Car, Inc., owns a well-maintained brick office warehouse purchased from The American Red Cross, known as the Spirit of Liberty building in Liberty, Missouri. Mr. Blanc leases this warehouse for $1 per year to two ministries, In As Much Ministries, and Love, Inc., which use the property to help the local poor. In fact, In As Much Ministries feeds more than 400 families per month. The property has never been declared blighted. Indeed, one city council member was said to have stated during a council meeting that "there are no poor people in Liberty," a statement which the Executive Director of In As Much Ministries disputed with documentation at the next city council meeting.

Then the city decided to build a business district on "Liberty Triangle," which consists of 88 acres of land, including Mr. Blanc's office warehouse. In December, 2002, the city established a tax increment financing (TIF) district in the Triangle to promote business development. The first phase of the Triangle project has already begun, and a 160,000

square-foot Lowe's Home Improvement Store has just recently opened. Steve Hansen, the city's public works director, recently told businesses that those which generate high sales tax income for the city will be allowed to remain in the area, but that "[m]ost of the businesses that are there now are not high sales producers" and will be condemned. Summer Harlow, *Officials in Liberty Banking on Triangle, Development Seen As Boon to the City*, Kansas City Star, June 6, 2004, at 2 (2004 WL 82045125). The city's primary purpose in the condemnation of Liberty Triangle is to raise tax revenue to the city. Jack "Miles" Ventimiglia, *An Eminent Domain Primer: State Law Favors Government, Not Public*, Liberty Sun-News, Aug. 19, 2004.[9]

Mr. Blanc has received a final notice from the city requiring him to sell his property, or face condemnation. Although he has not yet decided whether to challenge the taking of his property, he faces serious obstacles should he do so. As one attorney recently noted, condemnations are rarely challenged in Missouri because "the legislature has invested the 'local legislatures' with virtually absolute discretion." *Id.* Indeed, eminent domain presents a classic David-and-Goliath situation. *See* Jones, *supra*, at 297; *Basin Elec. Power Co-op. v. Lang*, 304 N.W.2d 715, 718 (S.D. 1981) (Henderson, J., dissenting). A condemnee finds himself confronted by the full legal power of the state, asserting a practically boundless authority to take the person's property against his will. He is exposed to extreme psychological and political pressure, both from the authorities and from neighbors who might benefit from the taking. Because a condemnee rarely can afford good legal representation, he will generally acquiesce in the condemnation without bringing a serious challenge to the law. The state, on

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[9] http://www.zwire.com/site/news.cfm?newsid=12714176&BRD=1452&PAG=461&dept_id=155083&rfi=8 (visited Nov. 16, 2004).

the other hand, has seemingly limitless resources, both economic and legal, with which to pursue a condemnation.[10]

The condemnation of charity property is nothing new. In fact, in 1996, when Atlanta, Georgia, sought to "clean up the city" to make way for the Olympic Games, it condemned the properties of some 10,000 people, including three homeless shelters. Sandefur, *supra*, at 670 n.563. Since nonprofit organizations have little money to spend on legal defense, it is impossible to say how many are unable to challenge the taking of their property. In fact, in Mr. Blanc's case the city's real estate agent has suggested that, because Mr. Blanc charitably leases the property for $1 per year, the amount he can expect to receive as "just compensation" could be lower than businesses that lease their property for the full land value.

CONCLUSION

The "public use" clause sets up a legal "fence," which makes good neighbors by ensuring that their relationships are based on mutual respect for each other's property rights. Property rights are essential to domestic tranquility, not only because they ensure personal liberty and a strong economy, but because they protect personal happiness and the public *mores* of democratic society. Equating public use with public benefit has torn down that fence, and subjected people's homes, businesses, and land to a process in which they have very little voice compared to the influence of powerful interest groups. Democratic participation becomes, not a rite of citizenship for which people volunteer, but a struggle for the very survival of their homes, their businesses, and their families. The "public choice effect" is responsible for this, and only by restoring the

[10] Indeed, until Mrs. Pappas began her legal challenge, discussed in part IIC, *supra*, Las Vegas had used eminent domain for redevelopment 143 times without a lawsuit. Squires, *supra*.

public use clause as a meaningful limit on the power of eminent domain, can these effects be averted.

The judgment of the Connecticut Supreme Court should be *reversed*.

DATED: December, 2004.

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